DOCKET FILE COPY ORIGINAL

LAW OFFICES

COHN AND MARKS

STANLEY S. NEUSTADT
STANLEY B. COHEN
RICHARD M. SCHMIDT, JR.
JOEL H. LEVY
ROBERT B. JACOBI
ROY R. RUSSO
RONALD A. SIEGEL
LAWRENCE N. COHN
RICHARD A. HELMICK
WAYNE COY, JR.

MARK L. PELESH
J. BRIAN DE BOICE
ALLAN ROBERT ADLER

SUSAN V. SACHS
JOHN R. PRZYPYSZNY
MELINDA S. LITTELL

OF COUNSEL
MARCUS COHN
LEONARD H. MARKS

SUITE 600
1333 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON, D.C. 20036-1573

TELEPHONE (202) 293-3860
TELECOPIER (202) 293-4827

DIRECT DIAL: (202) 452-4844

August 24, 1993

RM-8362

RECEIVED

AUG 24 1993

POLICY & RULES DIVISION

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Attn: Mass Media Bureau Policy and Rules Division

Dear Mr. Caton

This letter is written on behalf of Mt. Wilson FM Broadcasters, Inc., the licensee of FM Broadcast Station KKGO, Los Angeles, California. Mt. Wilson respectfully urges the Mass Media Bureau expeditiously to commence a rule making proceeding looking toward the deletion of FM Channel 285A from San Clemente, California, as directed by the Commission.

Mt. Wilson was a party in On The Beach Broadcasting, MM Docket No. 89-503, in which the Commission issued a Memorandum Opinion and Order, released May 10, 1993, denying two pending applications to utilize that channel. In paragraph 24 of its opinion, the Commission stated:

> Therefore, we direct the Bureau to initiate as quickly as possible a notice and comment rule making proceeding looking toward the deletion of Channel 285A at San Clemente from the Table of FM Allotments.

Mt. Wilson hopes that this action will be taken expeditiously, in order to prevent the filing of unnecessary applications by parties who may not be aware of the Commission's direction.

Very truly yours

Stanley S. Neustadt

Stanley S. Neustadt

SSN:btc

cc: Roy J. Stewart, Chief,
Mass Media Bureau
Douglas W. Webbink, Chief
Policy and Rules Division
Mr. David Silberman

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-503

In re Applications of

ON THE BEACH BROADCASTING — File No. BPH-850712UP

PORTOLA BROADCASTING CORPORATION — File No. BPH-850712VJ

For a Construction Permit for a New FM Station on Channel 285A at San Clemente, California

RM-8362

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 1993; Released: May 10, 1993

By the Commission: Commissioner Duggan issuing a separate statement.

1. This case involves the applications of On the Beach Broadcasting (Beach) and Portola Broadcasting Corporation (Portola) for a construction permit for a new FM broadcast station to operate on Channel 285A (104.9 MHz) at San Clemente, California. Beach and Portola propose to operate their stations from a common antenna site known as Clemente Peak. Station KKGO(FM), Los Angeles, California, a Class B station licensed to Mt. Wilson FM Broadcasters, Inc. (Mt. Wilson), operates on first adjacent Channel 286 from a site that is located 61.35 miles from Clemente Peak. Section 73.207 of the Commission's Rules, 47 C.F.R. §73.207, requires a distance separation of 65 miles between a Class A station and a Class B station operating on a first adjacent channel.[1] Accordingly, the proposals of Beach and Portola are short-spaced to station KKGO(FM) by 3.65 miles. The applicants concede that their proposals are inconsistent with Section 73.207, and each has requested a waiver of the rule.

2. In an Initial Decision released September 5, 1991, Administrative Law Judge (ALJ) Joseph P. Gonzalez concluded that each of the applicants failed to justify its request for a waiver of Section 73.207, that each applicant was thus unqualified, and that each application had to be denied. *On the Beach Broadcasting,* 6 FCC Rcd 5221. The Review Board affirmed the denial of Beach's and Portola's applications. *On the Beach Broadcasting,* 7 FCC Rcd 1346, released February 13, 1992.[2] We agree with the Board's disposition of this matter and affirm its decision.[3]

I. BACKGROUND

3. In its decision, the Review Board set out the background of this case in some detail, *see* 7 FCC Rcd 1346-1349 ¶ ¶ 2-7, and we need not repeat that here. To summarize, Channel 285A was allotted to San Clemente in a hotly contested rule making proceeding. *See Report and Order in MM Docket No. 84-442,* 50 Fed. Reg. 8226, published March 1, 1985, *reconsideration denied,* Mimeo No. 6281, released August 13, 1986, *review denied,* 2 FCC Rcd 2514 (1987), *reconsideration denied,* 3 FCC Rcd 6728 (1988). The Report and Order specified a site restriction of 8.9 km (5.5 miles) southeast of San Clemente to protect the spacing requirements to FM stations in San Diego and

---

[1] Section 73.207 prescribes minimum distances between FM stations according to the frequency utilized and class of facility. These minimum separation requirements are intended to prevent interference between FM stations. *See North Texas Media, Inc. v. FCC,* 778 F.2d 28, 30-31 (D.C. Cir. 1985), *aff'g North Texas Media, Inc.,* FCC 84-456, released October 5, 1984.

[2] The application of a third applicant, James Harden and Claudia Harden, A Partnership, was dismissed by the Board for failure to prosecute, 7 FCC Rcd at 1352 ¶ 22, and its application is not discussed further herein.

[3] Now before the Commission are: (a) an application for review filed March 13, 1992, by Portola; (b) an application for review filed March 23, 1992, by Beach; (c) the Mass Media Bureau's (Bureau's) consolidated comments, filed March 30, 1992; (d) Beach's opposition to Portola's application for review, filed March 30, 1992; (e) the consolidated opposition of Mt. Wilson to applications for review, filed March 30, 1992; (f) a petition for leave to amend and amendment, filed June 25, 1992, by Beach; (g) a petition to reopen the record, filed June 25, 1992, by Beach; (h) the Bureau's consolidated comments on petition for leave to amend and petition to reopen the record, filed July 7, 1992; (i) opposition of Mt. Wilson to petition for leave to amend, filed July 10, 1992; (j) opposition of Mt. Wilson to petition to reopen the record, filed July 10, 1992; (k) petition of Mt. Wilson for leave to file supplement to opposition to petition for leave to amend, filed July 17, 1992; (l) petition of Mt. Wilson for leave to file supplement to opposition to petition to reopen the record, filed July 17, 1992; (m) supplement to oppositions of Mt. Wilson to petitions to reopen record and for leave to amend; (n) petition of Beach for leave to file consolidated reply and comments, filed July 17, 1992; (o) consolidated reply and comments of Beach, filed July 17, 1992; (p) petition of Mt. Wilson for leave to file additional pleading, filed July 21, 1992; (q) supplement of Mt. Wilson to opposition to petition for leave to amend, filed July 21, 1992; (r) motion to strike supplement to opposition to petition for leave to amend, filed July 24, 1992, by Beach; (s) petition for leave to file supplement to amendment, filed July 28, 1992, by Beach; (t) supplement to petition for leave to amend and amendment, filed July 28, 1992, by Beach; (u) petition for leave to file second supplement to amendment, filed August 13, 1992, by Beach; (v) second supplement to petition for leave to amend and amendment, filed August 13, 1992, by Beach; (w) letter, dated August 13, 1992, from M.E. Lowe, Colonel, U.S. Marine Corps, Chief of Staff, Camp Pendleton, California, to the Secretary of the Commission; (x) opposition of Mt. Wilson to Beach's petition for leave to file second supplement to amendment, filed August 24, 1992; (y) Bureau's opposition to petition for leave to amend, filed September 22, 1992; and (z) Beach's request to withdraw petition for leave to amend, filed April 2, 1993. As Beach has abandoned its requests for acceptance of its tendered amendment and consequent reopening of the record, we will dismiss all of the pleadings listed above that argue for or against those requests and will also dismiss the associated motions to file or strike.

Palm Springs, California. This restriction limited fully-spaced sites to the confines of the Marine Corps base at Camp Pendleton, which is located south of the city limits of San Clemente.

4. Mt. Wilson objected to the allotment of Channel 285A to San Clemente. It argued that, because of objections by Camp officials, Camp property would not be available for a proposed transmitter site. The Mass Media Bureau's Report and Order allotted the channel to San Clemente nonetheless on the basis of a disputed statement by an officer at Camp Pendleton that the authorities might consider locating a transmitter within the boundaries of the Camp. By the time the case reached the Commission on applications for review, it was clear that no site at Camp Pendleton would be available. The Commission nevertheless upheld the allotment on the ground that it was properly based on a factual determination that was reasonable at the time and because it would be inequitable to delete the allotment without considering pending applications that specified short-spaced sites outside of Camp Pendleton and the associated requests for waiver of the FM spacing rule. 3 FCC Rcd at 6728-29. Mt. Wilson and another radio station that had objected to the channel allotment filed petitions for review challenging the allotment with the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals held that the appeals were "not ripe for review at this time" because the Commission had not yet authorized anyone to operate a station on the channel. *Mt. Wilson FM Broadcasters, Inc. v. FCC*, 884 F.2d 1462, 1466 (D.C. Cir. 1989). The Court stated that at the upcoming hearing on the applications for the allotment, "all of the issues which concern . . . [the] petitioners and potential applicants will be resolved by the Commission." *Id.*

5. A few months later, the applications of Beach, Portola and seven others for the San Clemente allotment were designated for hearing. *Hearing Designation Order (HDO)*, 4 FCC Rcd 8399 (1989). The *HDO* specified an issue to determine whether the proposals of the applicants are consistent with the minimum distance separation requirements of Section 73.207, and, if not, whether circumstances exist that warrant waivers of the spacing rule. *Id.* at 8402 ¶ 21. Mt. Wilson was made a party to the proceeding with respect to this issue. *Id.* at ¶ 28.

II. INITIAL DECISION AND REVIEW BOARD DECISION

6. The ALJ concluded that a waiver of Section 73.207 was not warranted for either Portola or Beach. The ALJ rejected Portola's waiver request because "Portola failed to present any evidence indicating that it sought to locate a fully-spaced site or a site less short-spaced than its present site." 6 FCC Rcd at 5222 ¶ 12. Although the ALJ found that Beach made a "good faith effort . . . to acquire fully-spaced or less short-spaced" sites, *id.* at 5222 ¶ 13, he rejected Beach's waiver request because Beach failed to show that the public interest benefits flowing from a grant of the waiver would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *Id.* Utilizing the computation method most favorable to the applicants, the ALJ found that the short-spacing proposed here would be responsible for causing interference to 3.4% of the total population, or 330,551 persons, within the protected contour of station KKGO(FM), and 3.8% or 430 sq. km. of the area served by KKGO(FM), and that KKGO(FM) would, in turn, cause interference to 26.4% of the population, or 42,147 persons, and 14% of the area or 81 sq. km. served by the proposed short-spaced San Clemente stations. 6 FCC Rcd at 5222 ¶ 11.[4] The ALJ concluded that the amount of interference involved would be "patently unacceptable." Id. at 5222 ¶ 13.[5] The ALJ further concluded that "the applicants have otherwise failed to demonstrate any public interest factors to compensate for this significant degree of interference." *Id.*

7. The Review Board agreed with the ALJ that the applicants failed to justify their requests for a waiver of Section 73.207. 7 FCC Rcd 1346. First, the Board held that Portola made no independent search for a fully-spaced site or a lesser short-spaced site, and that its failure to do so was fatal to its request for a waiver of the rule. *Id.* at 1351 ¶ 18. Second, the Board concluded that although Beach made a sufficient showing at the hearing that no suitable fully-spaced site or less short-spaced site was available, Beach did not demonstrate that the public interest benefits that would result from its proposal were sufficiently compelling to offset the magnitude of the potential interference caused to, and received from, station KKGO(FM). *Id.* at 1351-52 ¶ ¶ 18-21. The Board considered and weighed all of the alleged public interest benefits advanced by the applicants in support of a waiver[6] and ultimately determined that these benefits were not sufficient to overcome

---

[4] Pursuant to the Commission's decision in *Tri-Valley Broadcasting Co.*, 4 FCC Rcd 4711 (1989), the parties adduced evidence at the hearing depicting the amount of interference that would be caused to KKGO(FM) by a San Clemente station operating on Channel 285A from Clemente Peak and by KKGO(FM) to a San Clemente station. In *Tri-Valley*, the Commission held that:

> [I]n those instances where an applicant seeking waiver of the distance separation requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, . . . predictions of the protected and interfering contours of the affected stations . . . provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference.

Id. at 4712 ¶ 9.

[5] Station KKGO(FM) is a grandfathered superpower station operating with a height and power combination which exceeds the maximum height and power combination for Class B stations. *See* 7 FCC Rcd 1346, 1352 n.1. In considering the amount of interference that would be caused by KKGO(FM), the ALJ assumed that the Los Angeles station would be operating with only maximum Class B height and power rather than its actual superstation facilities. In reality, therefore, KKGO(FM) would unquestionably cause more interference to either of the short-spaced San Clemente proposals than is predicted on paper.

[6] These public interest factors include: the presence of a nuclear power plant (allegedly justifying a second San Clemente radio station for emergency broadcasts in the event of a disaster at the power plant); San Clemente's population increase; the purported status of Clemente Peak as a *de facto* antenna farm; the alleged equities of the applicants; the absence of any alternative channels; the provision of a second aural service to the community; the amount of short-spacing involved; and the ownership of Portola by a member of a minority group. *See* FCC Rcd at 1352 ¶ 21 & 1354-1355 nn. 5-10.

the "patently unacceptable" interference that would be caused, "especially" in light of the facts that "one facility [is] already licensed to San Clemente and [there are] more than 30 other radio signals available in the community (from nearby cities)." *Id.* at 1352 ¶ 21 (footnote omitted).

III. DISCUSSION

A. Portola's Directional Antenna Amendment

8. In its application for review, Portola argues that the Board erred when it upheld the ALJ's decision to reject an amendment filed by Portola on January 8, 1990, which Portola claims would have made the need for a short-spacing waiver unnecessary. Portola's amendment proposed the use of a directional antenna. The amendment was rejected because of "Portola's failure to comply with the provisions of 47 C.F.R. §73.215(b)(2)(ii) in calculating predicted contours," thus "render[ing] its amendment technically flawed and incapable of grant." 7 FCC Rcd at 1353 n.3; *see Memorandum Opinion and Order,* FCC 90M-846, released April 18, 1990.

9. In 1989, the Commission adopted new rules permitting an applicant for a commercial FM radio station to request the authorization of a transmitter site that would be short-spaced to the facilities of co-channel or adjacent channel stations, provided the service of the existing stations is protected from interference. *Report and Order, Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas,* 4 FCC Rcd 1681 (1989). The Commission stated that the necessary protection could be afforded by, among other things, utilizing a directional antenna. *Id.* at 1685-86.

10. Portola sought to take advantage of the new rules when it filed a petition for leave to amend on January 8, 1990. Portola's amendment was rejected by the ALJ because Portola failed to provide the requisite contour protection to station KKGO(FM). *Memorandum Opinion and Order, supra,* FCC 90M-846. Portola's argument essentially amounts to a contention that acceptance of its amendment depends on which "methodology" is used to calculate KKGO(FM)'s protected contour, Portola's method or the method set forth in Section 73.215 of the Commission's Rules. But the new rule gives no support for Portola's method. Rather, Section 73.215(b)(2)(ii) of the Commission's Rules provides that, in order to take advantage of directionalization, contours have to be based on the "maximum ERP [effective radiated power] for the applicable station class." Because station KKGO(FM) is a Class B station, and the maximum ERP for a Class B station is 50 kW, an ERP of 50 kW must be employed in calculating KKGO(FM)'s protected contour. When an ERP of 50 kW is employed, Portola's proposed directional antenna does not provide the requisite contour protection to KKGO(FM). While Portola alleges that its methodology for calculating KKGO(FM)'s protected contour is "supported by more than a quarter century of precedent," *Application for Review,* p. 2, Portola ignores the plain language of the rule.[7] Section 73.215(b)(2)(ii) does not contemplate that a superpower station's ERP will be downgraded to an equivalent level. It simply requires the use of maximum ERP for the station class. It is undisputed that Portola did not calculate KKGO(FM)'s protected contour based on an ERP of 50 kW. Therefore, Portola's amendment was technically flawed and properly rejected. 7 FCC Rcd at 1353 n.3; *Memorandum Opinion and Order, supra,* FCC 90M-846.

B. The Applicants' Waiver Showings

11. When an applicant for an FM station requests a waiver of the minimum distance separation rule, it must show that: (a) there are no fully spaced sites available; (b) the proposed site is the least short-spaced site available; and (c) the public interest benefits flowing from a grant of the waiver request would be sufficiently compelling to offset the magnitude of the spacing deficiency proposed. *See Megamedia,* 67 FCC 2d 1527, 1528 (1978); *Townsend Broadcasting Corp.,* 62 FCC 2d 511, 512 (1976). In deciding whether to waive Section 73.207, the Commission considers both the public interest benefits and public interest detriments -- including any potential objectionable interference to *and* from an existing FM station or stations -- in light of all the information presented by the applicants in their waiver requests and by any interested party. *See Tri-Valley Broadcasting Co.,* 4 FCC Rcd at 4712 ¶ 9. *See also Concurring Statement of Board Member Greene,* 7 FCC Rcd at 1356.

12. In this case, the Board found that the record appears to support Beach's claim that it had satisfied the first and second parts of the three-part test,[8] but held that it failed to sustain its burden of proof under the third part. 7 FCC Rcd at 1351 ¶ 18, 1352 ¶ 20. On the other hand, the Board found that Portola failed to make the requisite showing under the first two parts of the test. Therefore, it was unnecessary to determine whether Portola met its burden under the third part of the test. *Id.* at 1351 ¶ 18.[9]

---

[7] The twenty-five years of precedent relied upon by Portola was effectively overruled by the change in Section 73.215 in 1989, and any disagreement that Portola had with that action should have been raised in connection with that rule making proceeding.

[8] The Board noted, however, that the applicants' joint engineering consultant had conceded that "a fully-spaced tall tower could, in fact, be erected to provide service to San Clemente," *id.* at 1351 ¶ 19, and stated that this concession "does not assist the applicants in meeting their stringent waiver burdens," *id.* at 1352 ¶ 19.

[9] Unlike Portola, Beach appears to have made a good faith effort to meet the first two parts of the three-part test for a short-spacing waiver. The record shows that Beach "made multiple contacts throughout the area in and around San Clemente over a period of years in its effort to obtain a fully-spaced site, apparently to no avail." 7 FCC Rcd at 1351 ¶ 18; *see* 6 FCC Rcd at 5222 ¶ 12. *See also* Beach Exhibit (Ex.) 4; Joint Ex.2; Supplement to Joint Ex. 2. Mt. Wilson challenged Beach's efforts to make the threshold showing in its exceptions to the Initial Decision, but Mt. Wilson did not file an application for review or a contingent application for review. Instead, Mt. Wilson filed a consolidated opposition to the applications for review in which it purports to preserve some of the arguments it made unsuccessfully below. *See Consolidated Opposition of Mt. Wilson,* p.1, n.2. We have reviewed the record on this matter and believe that, although it is a close question, Beach appears to have made the requisite threshold showing under the first two parts of the waiver test. *See WSET, Incorporated,* 80 FCC 2d 233, 242-43 (1980), where we relied upon the statement of the applicant's aviation consultant as to the unsuitability of a non-short-spaced site because, in his opinion, FAA approval would

13. We agree with the ALJ and the Board that Portola "defaulted" and failed to meet the threshold test for a waiver of Section 73.207.[10] *See* 7 FCC Rcd at 1351 ¶ 18 & 1353 n.3; 6 FCC Rcd at 5222 ¶ 12. It is well established that, "[w]hen an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action." *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).[11] "An applicant seeking a waiver [of Section 73.207] must . . . make a threshold showing, using legitimate engineering evidence, that no properly spaced [site] is obtainable." *North Texas Media v. FCC*, 778 F.2d at 32. *See Kenter Broadcasting Co.*, 62 RR 2d 1573, 1577 (1986), *aff'd*, 816 F.2d 8 (D.C. Cir. 1987) (table). In this case, Portola failed to make this showing. Portola made no independent search for a fully-spaced site or for a lesser short-spaced site, Portola did not present any evidence in this regard to support its request for waiver of Section 73.207, and Portola merely joined in the joint engineering exhibits. 7 FCC Rcd at 1351 ¶ 18. Portola asserts that it was not required to make a threshold showing because the Commission stated in the Channel 285A allotment proceeding that no fully spaced sites appeared to be available. However, as the Board held, "had Portola tried to locate a lesser short-spaced site, it *may* have been successful. But it did not even try, and its failure to do so is fatal to its request for a waiver." *Id.* at 1353 n.3 (citation omitted).

14. Nevertheless, even if we concluded that Portola made the necessary threshold showing, we would further conclude that Portola, like Beach, failed to show that the public interest benefits flowing from a grant of the waiver request "are sufficiently compelling" – either individually or when considered in the aggregate – "to offset the magnitude of the potential interference." *Tri-Valley Broadcasting Co., supra*, 4 FCC Rcd at 4712 ¶ 9. *See* 7 FCC Rcd at 1352 ¶ 21 & 1354-55 nn.5-10.[12] Specifically, the record shows that, operating as proposed from Clemente Peak, the applicants' station would cause objectionable interference to 3.4% of the population (330,551 persons) and 3.8% or 430 sq. km. of the area within the protected contour of station KKGO(FM). *See* 7 FCC Rcd at 1350 ¶ 13, citing 6 FCC Rcd at 5222 ¶ 11. In addition, the record shows that KKGO(FM) would cause interference to 26.4% of the population (42,147 persons) and 14% or 81 sq. km. of the area that would otherwise be served by the proposed short-spaced San Clemente station. *Id.* The ALJ and the Board characterized this interference as "patently unacceptable." *See* 7 FCC Rcd at 1352 ¶ 20; 6 FCC Rcd at 5222 ¶ 13. We agree.

15. Although Beach and Portola contend that the ALJ and the Board incorrectly assessed the relevance and/or the significance of the interference which would result between their proposals and station KKGO(FM) if the Commission granted either of their applications, they do not dispute the fact that interference caused by a short-spaced proposal is a factor which may be considered in determining whether to waive the minimum distance separation rule. *See Tri-Valley, supra*, where the extent of interference was so "minimal" (*i.e.*, .3% of the area within the operating station's protected contour) as to have little or no impact on the Commission's ultimate decision to waive the rule. Beach disagrees with the Board's conclusion that the magnitude of the predicted interference in this case would be "patently unacceptable." Beach argues that, because this is only the second short-spacing case in which interference has been considered, with *Tri-Valley* being the first, there are no standards for concluding that the interference here would be "too much."[13]

16. Beach's argument is without merit. Before *Tri-Valley*, the Commission had consistently refused to waive the minimum distance separation rule on the basis of an applicant's claim that no objectionable interference would result because there would be no predicted overlap of the protected and interfering contours of the affected stations. 4 FCC Rcd at 4712 ¶ 9, citing *Florissant Broadcasting Co., Inc.*, 40 RR 2d 428 (1977). *See North Texas Media, Inc. v. FCC, supra*, 778 F.2d at 34-35 n.27; *Sotomayor v. FCC*, 721 F.2d 1408, 1409 n.3 (D.C. Cir. 1983).[14] In *Tri-Valley*, the Commission therefore added a new factor in a case involving a request for a waiver of the distance separation re-

---

not be available for that site. *Compare North Texas Media, supra*, ¶ 5, where the applicant "merely alleged that it could not find a non-short-spaced site from which it could serve [its community of license]." The applicant in *North Texas Media* "failed to supply any detailed engineering data or affidavits in support of [its] bare allegation." *Id.* In any event, we agree with the Board that Beach failed to satisfy the critical third part of the waiver test and that Beach's waiver request must, therefore, be denied.

[10] Portola's reliance on *Naguabo Broadcasting Company*, 6 FCC Rcd 4879 (1991), for the proposition that such a showing is not required is unavailing. No question concerning the three-part test was raised or considered in the Commission's order. In any event, however, the record in that case contains evidence of the efforts of the applicant in question to meet the first and second parts of the three-part test. *See Naguabo Broadcasting Company*, 5 FCC Rcd 2062, 2068-69 ¶ ¶ 59-62 (ALJ 1990).

[11] "The burden is on the applicant seeking waiver . . . to plead specific facts and circumstances which would make the general rule inapplicable." *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

[12] Portola argues that Section 73.207 should be waived because its owner/manager is a member of a recognized minority group. The Review Board properly rejected this argument and we affirm its decision on this matter. *See* 7 FCC Rcd at 1355 n.10. We note that an identical argument was made by a minority-owned applicant seeking a short-spacing waiver in *North Texas Media, Inc., supra*. We rejected the argument in that case because we could not "accept the [applicant's] inference that its minority status entitles it to [a] waiver of [the] purely technical standards [embodied in Section 73.207]. These standards were adopted as 'go, no-go' criteria after the Commission rejected the previous *ad hoc* approach. Waiving these standards on the basis of non-technical considerations would tend to undermine the allocation system as a whole. . . . As significant as considerations related to promotion of minority ownership may be in the context of a comparative hearing, we cannot say that the integrity of our basic allocations system is any less important." *North Texas Media, Inc., supra* at ¶ 8 (footnotes omitted). *See ICBC Corp. v. FCC*, 726 F.2d 926, 929 (D.C. Cir. 1983). We see no reason to depart from this precedent in this case.

[13] *But cf. Golden West Broadcasters*, 4 FCC Rcd 2097 (1989), where the Commission considered interference between FM stations in a case involving a request for a waiver of the maximum height and power requirements for FM stations.

[14] The Commission reasoned in the pre-*Tri-Valley* cases that use of protected and interfering contours as an assignment tool for commercial FM broadcast stations was specifically rejected in 1962 when the Commission adopted the minimum distance separation rule. In the Commission's judgment, distance separations offered a more simplified analysis of potential interference and ensured that stations initially operating at less than

quirements of Section 73.207. The Commission held that, "where an applicant seeking waiver of th[is] . . . requirement has made the necessary threshold showing that no suitable fully spaced or less short-spaced sites are available, . . . predictions of the protected and interfering contours of the affected stations . . . provide some measure of the extent of objectionable interference potentially involved and, thus, are useful in making our determination as to whether the public interest benefits are sufficiently compelling to offset the magnitude of the potential interference." 4 FCC Rcd at 4712 ¶ 9.

17. *Tri-Valley* thus offered waiver applicants the opportunity to demonstrate that the public interest would be served by a waiver by showing that the "objectionable interference" in the applicant's particular case is outweighed by identifiable and "compelling" public interest benefits. *Id.* Depending on the facts adduced in the record, this additional showing in waiver cases could lead to grants of waivers in some cases, as in the *Tri-Valley* case where the showing was successfully made, or to denials of waivers in other cases, such as this one, where the necessary "compelling" public interest showing was not made. However, this does not mean, as Beach suggests, that we cannot make the appropriate public interest judgment in this case based on the evidence adduced at the hearing simply because this is the second short-spacing case where the showing called for in *Tri-Valley* is being considered.

18. The facts in this case are much different than the facts in *Tri-Valley*. In *Tri-Valley*, the applicant made a compelling showing in support of a waiver of Section 73.207. Specifically, it demonstrated that it had been issued a construction permit before it lost its properly spaced site and that it was providing a first local service to its proposed community. In addition, state and local officials expressed their concern that terrain obstruction prevented the community of license from receiving adequate coverage from any other radio station, and there was a nuclear power plant nearby, underscoring the need for a first local radio station in the case of an emergency. Furthermore, "the area predicted to receive interference by [an existing station's] own calculations [wa]s minimal, representing less than .3% of the area within [the existing station's] protected contour." Under all of these circumstances, the Commission granted a waiver. 4 FCC Rcd at 4712. *See* 7 FCC Rcd at 1353 n.2.

19. There are no comparable public interest benefits in this case. The evidence shows that San Clemente already has a local radio station, that the community is served by more than 30 other radio signals from nearby cities, and that severe, rather than minimal, interference would result from allowing a short-spaced operation on Channel 285A at San Clemente. With respect to interference in particular, the record evidence shows that, due to the proposed short-spacing, 42,147 persons, or more than one-quarter of the population within the protected contours of Beach's and Portola's proposed facilities, "would be unable to adequately hear the radio stations." *Initial Decision,* 6 FCC Rcd at 5222 ¶ 13. Furthermore, even if the applicants were able to provide interference-free service to all of the 160,000 persons within their proposed service area, more than twice that number (or 330,551 persons) would *lose* existing service from station KKGO(FM). We agree with the Bureau that these may be numbers of first impression, but they hardly make this a borderline case. We therefore conclude that the Board properly considered the evidence of potential interference in this case and correctly weighed that evidence against the public interest benefits alleged by the applicants. *See* 7 FCC Rcd at 1352 ¶ ¶ 20-21. *Cf. Television Corp. of Mich., Inc. v. FCC,* 294 F.2d 730, 732 (D.C. Cir. 1961); *Hall v. FCC,* 237 F.2d 567, 572 (D.C. Cir. 1956) (any deprivation of broadcast service to any group of people is *prima facie* not in the public interest and can be justified only by countervailing public interest factors sufficient to offset that deprivation).

20. Both Beach and Portola argue that, if interference is to be considered, the only interference that is relevant is that which differs from the interference that would result from utilization of a properly spaced transmitter site. We disagree with the applicants and reject their argument. Evidence as to the degree of interference that would result from a fully-spaced site is not relevant in considering whether or not a waiver should be granted because we are *not* dealing here with a fully-spaced site. *See* 6 FCC Rcd at 5223 ¶ 14. A properly spaced site for the San Clemente allotment is not available and no one has proposed operation from such a site. Therefore, hypothetical calculations based on an unavailable site are irrelevant in this proceeding. There is no more reason to compare one particular hypothetical properly spaced site with the actual proposals from Clemente Peak, as the applicants seek to do, than to compare possibly dozens of other properly spaced sites. The results would provide us with little meaningful information, except that the interference would be less from a properly spaced site than from the proposed short-spaced site.

21. Finally, we have considered the alleged public interest benefits of a grant, which are cited by the applicants in their applications for review and listed in n.6, *supra.* We agree with the Review Board that the public interest benefits asserted by Beach and Portola are not sufficiently compelling, either individually or collectively, "to overcome the severe interference considerations, especially with one facility already licensed to San Clemente and the conceded presence of more than 30 other radio signals available in the community (from nearby cities)." 7 FCC Rcd at 1352 ¶ 21. *See* 7 FCC Rcd at 1354-55 nn.5-10.

22. We disagree with Beach that the "equities" of the applicants somehow outweigh the need to protect the public from the loss of an existing service that would result from a grant. Beach's argument to the contrary, we are aware of the considerable efforts -- and expense -- of the applicants in prosecuting their applications for a new radio station on Channel 285A in San Clemente. We had been hopeful from the outset of this proceeding that an acceptable short-spaced site would be found and that one of the applications could be granted in the public interest, but the record establishes that neither of the applicants was able to prove at the hearing that there is such a site or that the

facilities for their class would have the opportunity to increase to maximum facilities in the future. The Commission took the position in distance separation cases before *Tri-Valley* that the protected contour concept would cause delays and burdens to the Commission, private parties and, ultimately, the public and would not afford the "go, no-go" certainty and flexibility inherent in the table of allotment/minimum distance separation scheme adopted in 1962. *See North Texas Media, Inc. v. FCC, supra* at 30-31.

public interest, as opposed to the private interests of the applicants, would be served by a waiver of Section 73.207. In short, the loss of existing service in this case would be substantial and contrary to the public interest. As the Review Board held, "the applicants were on notice that the establishment of a facility at San Clemente would require overcoming some very high hurdles, indeed." 7 FCC Rcd at 1352. The applicants did not overcome these hurdles and "there are not sufficient equitable considerations present here to overcome the[] interference considerations." *Id.* The record thus dictates denial of both applications.

IV. CONCLUSION

23. We have afforded Beach's and Portola's waiver requests the "hard look" called for under *WAIT Radio v. FCC, supra,* 418 F.2d at 1157, and, based on the evidence in the record, have concluded that the policy considerations underlying the *Townsend, Megamedia,* and *Tri-Valley* cases and our FM allocations scheme clearly outweigh any future benefits which might accrue if either application were granted. Therefore, we agree with the ALJ and the Board that the applicants' waiver requests must be denied, that the applicants are unqualified, and that their applications must, therefore, be denied.

24. In the channel allotment proceeding, we stated that we would not have allotted Channel 285A to San Clemente in the first place had we known at the time that no site was available for its use by a fully-spaced station. We also stated that the channel would remain allotted to San Clemente in light of the fact that applications for the channel were pending at the time and the applicants were contending that there were grounds for a waiver of Section 73.207. *Amendment of Section 73.202(b) (San Clemente, California),* 3 FCC Rcd at 6729. Now, having carefully considered the waiver requests of the applicants and having concluded that the public interest would not be served by a grant of either of the remaining applications for the channel, we believe that a properly spaced station on this channel may never be possible and, therefore, that the allotment of the channel may no longer serve the public interest. This is especially true in light of the continuing and vigorous opposition of the U.S. Marine Corps to the erection of a radio tower on or near Camp Pendleton. Therefore, we direct the Bureau to initiate as quickly as possible a notice and comment rule making proceeding looking toward the deletion of Channel 285A at San Clemente from the Table of FM Allotments. *See* Section 1.411 of the Commission's Rules; *Amendment of Section 73.202(b) (Pinckneyville, Illinois),* 41 RR 2d 69 (Broadcast Bureau 1977).

25. ACCORDINGLY, IT IS ORDERED, that pursuant to 47 C.F.R. §1.115(g) the application for review filed March 13, 1992, by Portola Broadcasting Corporation, and the application for review filed March 23, 1992, by On the Beach Broadcasting ARE DENIED.

26. IT IS FURTHER ORDERED, that the motion filed on April 2, 1993 by On the Beach Broadcasting for permission to withdraw its petition for leave to amend and associated pleadings IS GRANTED; that its petitions for leave to amend and for reopening the record filed on June 25, 1992 ARE therefore DISMISSED; and that the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file supplement to opposition to petition for leave to amend, filed July 17, 1992; the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file supplement to opposition to petition to reopen record, filed July 17, 1992; the petition of On the Beach Broadcasting for leave to file consolidated reply and comments, filed July 17, 1992; the petition of Mt. Wilson FM Broadcasters, Inc. for leave to file additional pleading, filed July 21, 1992; the petition for leave to file supplement to amendment, filed July 28, 1992, by On The Beach Broadcasting; and the petition for leave to file second supplement to amendment, filed August 13, 1992; by On The Beach Broadcasting ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Concurring Statement
of
Commissioner Ervin S. Duggan

In re: On the Beach Broadcasting

This case should properly be called "The Allotment That Wouldn't Die."

Based on a highly disputed statement from a military official, the Commission allotted a channel to San Clemente where the only feasible tower site would have been on the property of Camp Pendleton. As a consequence of this curious move, the Commission sent unwitting applicants through an eight-year regulatory maze to make good use of the channel allotment even as it became clear that military officials would never allow the building of a broadcast station on the base.

To add insult to injury, it now appears that the Commission's action may have been unprecedented, given the fact that the military has rarely, if ever, allowed this type of commercial construction on military property. It is therefore fitting, and unfortunately too late for these applicants, that we now drive a final nail into the coffin of this allotment.